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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 355

HAROLD A. MEYER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit.

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PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit.

The Petitioner, Harold A. Meyer, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming the judgment of the District Court for the Southern District of Illinois in the case entitled United States of America v. Harold A. Meyer, No. 15292 in the United States Court of Appeals for the Seventh Circuit, entered April 18, 1966.

OPINION BELOW.

The Opinion of the Court of Appeals, not yet reported, is printed in the Appendix to this Petition (App. 1a-4a).

JURISDICTION.

The judgment of the Court of Appeals was entered on April 18, 1966. Rehearing was denied on May 16, 1966. The jurisdiction of this Court is invoked under 28 U. S. C., § 1254 (1), and this Honorable Court entered its Order on June 15, 1966, extending time for filing the Petition for Writ of Certiorari to and including July 15, 1966.

QUESTIONS PRESENTED.

1. Whether or not a jury is fully and fairly instructed where the instruction failed to include the requirement of specific intent but dealt with the issue of good or bad faith on the part of the Defendant and which eliminated the necessity on the part of the Government to prove the requisite element of specific intent to commit the crime as charged in the indictment under the Statute?

2. Whether the conflict among two Circuit Courts of Appeal on the scope and applicability of an instruction where one Circuit Court of Appeals (Seventh) holds that said instruction is corrected by other instructions and that any possible error in the instruction was harmless, and another Circuit Court of Appeals (Fifth) held on a similar set of facts, an almost identical instruction to be clearly erroneous, and should such conflict require resolution by this Court in this case?

STATUTES INVOLVED.

Title 15, Section 77q (a), United States Code:

It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments or transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transportation, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

Title 18, Section 1341, United States Code:

"Whoever having devised or intending to devise any scheme or artifice to defraud for obtaining money or property by means of false or fraudulent pretenses, representations or promises, for the purpose of executing such scheme or artifice, or attempting to do so, places in any post office or authorized depository for mail matter any matter or thing whatever to be sent or delivered by the post office department * * *" shall be punished.

STATEMENT OF THE CASE.

Defendant formed and organized an Illinois corporation, Business and Professional Women's Holding Company, the purpose of which was to purchase the first issue of stock in and thus provide for the formation of a life insurance company to be devoted primarily to the business of issuing policies on and selling life insurance to women. The life insurance company was to be staffed by women and in particular it was proposed and intended that a prominent woman in the entertainment and business world be selected to head up the company. Defendant did in fact negotiate with and submit the proposition to a number of such personages, or their agents, including Ann Sothern and Joan Crawford.

The Holding Company was duly incorporated, and following a technical objection under the Illinois Securities Act, which resulted in an offer to the then existing subscribers for stock, to rescind their subscription agreements, which offer was not accepted by anyone, the sale of stock proceeded with the goal being to raise sufficient money by such sale to meet the reserve requirements of the Insurance Department to activate an existing but inactive charter of some previously formed insurance company. It was desirable to activate an old charter for two reasons, First, the reserve requirements of the Insurance Department were increased substantially in recent years and an old charter could be activated by meeting the reserve requirements in effect as of the date of its issuance. Second, the women's insurance feature was considered to be good and if the insurance company operated only in Illinois, the idea might be used by others in other states, wherefore it was planned to obtain authority for the insurance company to do business in as many states as possible and as soon as possible. Since many states required age or antiquity of a charter to qualify, it was

likewise desirable to obtain a charter of some vintage rather than seek a new insurance company charter. Upon sale of a sufficient amount of stock in the holding company, which was simply a business corporation, the proceeds were to be paid over into the insurance company thus establishing the minimum reserve requirements to activate its charter, in exchange for all of the capital stock of the insurance company.

The activities in connection with the promotion, organization of the corporation and sale of stock spanned a period from November, 1960, until early summer, 1963. Although an option to purchase a charter was obtained and extended, and negotiations were carried on extensively for the purchase of other charters, the insurance company never got off the ground.

The charges were that defendant did wilfully and knowingly employ a device, scheme, and artifice to defraud, obtain money and property by means of untrue statements of material facts and omitting to state material facts necessary to make statements made not misleading, all in the following manner: that he organized and caused to be organized Business and Professional Women's Holding Company, an Illinois corporation, with authorized 500,000 shares of $1.00 par value stock, amended to 2,000,000 shares of 25¢ par value; that he would and did dominate, direct and control the affairs of said Company; that he would and did offer for sale and sell shares of said company to raise funds for purported purpose of acquiring and financing a life insurance company to write life insurance solely for women, but that he would and did operate and manage said company for the enrichment of himself by paying, appropriating, and converting to himself large sums of money in the guise of salaries, commissions, fees, expenses and other withdrawals; that the holding company at no time owned, nor had an option to purchase a life insurance company; that neither Ann

Sothern nor Joan Crawford agreed to serve as chairman of the Board; that Arlene Francis had not agreed to serve as an officer or director; that defendant appropriated to himself in excess of 50% of the money raised through the sale of stock; that defendant invested none of his own funds in the holding company stock.

The jury deliberated for more than six hours before returning a verdict, and Petitioner was convicted on 11 counts of a 15 count indictment pursuant to 15 U. S. C. 77q (a) and on 4 counts of a 15 count indictment pursuant to 18 U. S. C. 1341, and he was sentenced to five years imprisonment on each of the counts charging violations of the Securities Act of 1933, the sentences to run concurrently. He also received concurrent five-year sentences on the counts charging violations of the Mail Fraud Act, but that portion of the sentence was suspended and the defendant was admitted to probation, the period of probation to begin after the first portion of the sentence was served.

The Court below affirmed the judgment of conviction of the District Court upon the authority of Beck v. United States, 371 U. S. 890, holding that the jury could probably find from the evidence produced, the defendant guilty of a scheme to defraud investors in the sale of securities and the use of the mails and interstate transportation facilities in so doing, and that the instructions tendered as a whole, included no prejudicial error.

REASONS FOR GRANTING THE WRIT.

Clearly the question presented here is of great public interest in light of the recent opinions of this Court. A Court must be vigilant in its protection of a citizen's rights as Petitioner's here, when he is charged with wilfull violations of criminal statutes which includes intent as the gist of the crime. This means that he intended

to do the misdeeds in question; hence, a jury cannot be mislead as to the requirement of proof necessary for a guilty verdict or the law applicable thereto in the instructions it receives.

An instruction (No. 23) was given in this case as follows:

> "Under the Securities Act of 1933 and the Mail Fraud Statute, which laws of the United States the Defendant is charged in this indictment with violating, none of the investors need have been themselves deceived or defrauded by the Defendant or even have relied on the misrepresentations allegedly made to them.
>
> Under the law it is immaterial whether the alleged unlawful scheme is either successful or unsuccessful or that the Defendant received any benefits as a result of the alleged scheme.
>
> It is only necessary for the Government to prove that the Defendant devised a scheme with intent to defraud and made use of the mails in connection therewith as charged in the indictment."

The specific objections made to this instruction were that it was an abstract statement of the law, that it was prejudicial because not applicable to the facts and that the indictment charges successful fraud and therefore there was a variation from the indictment.

This very instruction was considered in the case of Coleman v. U. S., 167 F. 2d 837, at p. 840, where the Court said:

> "This also was clearly error, since to say in this case that the acquisition of money or property from the alleged scheme is 'not material,' is to rule out consideration by the jury of the charges of the indictment. (Citing in a foot-note the charges of the indictment which were similar to the charges in the

instant indictment.) The Government relied upon appellant's acquisition of money and property as evidence of the existence of the scheme; while defendants contended and testified that they profited nothing, as showing their good faith."

In the case before the Court, the Government charged in the indictment that defendant did sell the shares of stock and converted large sums of money to himself. The Government relied upon its proof that the money and property of the investors went to defendant's personal benefit. The only evidence upon the part of the Government as to the existence of any scheme, or the intent of defendant in formulating it, necessarily rested upon the inference derived from the fact that defendant acquired the money in the manner alleged. For the Court then to say it was immaterial whether or not the alleged scheme was "successful or unsuccessful, or that the Defendant received any benefits as a result of the alleged scheme," is to rule out consideration by the jury of the charges of the indictment.

The decision of the Court below is believed to be erroneous and the conflicting decision of the Circuit Court of Appeals (Fifth) in Coleman v. U. S., supra, correct.

The vital issue of Petitioner's intent, which occupied the main portion of the trial, was the critical issue submitted to the jury. The giving of this instruction (No. 23) had the effect of withdrawing this issue for consideration by the jury and making it unnecessary to prove the specific intent to defraud. This error cannot be cured by the giving of other instructions as the lower Court reasoned. Moreover, the decision below probably conflicts with applicable decisions of this Honorable Court.

In the case of Mills v. U. S., 164 U. S. 644, 41 L. Ed. 584, this Court said:

> "Although it may be claimed that other portions of the charge of the learned court stated correctly the law with reference to this particular case, yet we cannot escape the fear that the error above pointed out may have found lodgment in the minds of the jury. . . . Which of the two statements was received and acted upon by the jury it is wholly impossible for this Court to determine. . . ."

Where an erroneous instruction such as this is given, the argument that the jury was fully and fairly instructed must necessarily fail, even when all of the instructions are considered as a whole. An erroneous instruction is not cured by another correct one and where two inconsistent instructions are given, it is reversible error. The Mills case cogently suggests this Court's review of the lower Court's judgment.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

WILLIAM M. GIFFIN,
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Springfield, Illinois 62701,
Counsel for Petitioner.

APPENDIX.

In the
United States Court of Appeals
For the Seventh Circuit

September Term, 1965—April Session, 1966

No. 15292

United States of America, Plaintiff-Appellee, v. Harold A. Meyer, Defendant-Appellant.	Appeal from the United States District Court for the Southern District of Illinois, Southern Division.

April 18, 1966

Before Duffy and Swygert, Circuit Judges, and Grant, District Judge.

Swygert, Circuit Judge. The defendant, Harold A. Meyer, was found guilty by a jury on fifteen counts of an indictment, eleven of them charging violations of section 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a), and four charging violations of the Mail Fraud Act, 18 U.S.C. § 1341.[1] The sole question in this appeal is whether the granting of four jury instructions by the district court over the defendant's objection was reversible error.

[1] The defendant was sentenced to five years imprisonment on each of the counts charging violations of the Securities Act of 1933, the sentences to run concurrently. He also received concurrent five-year sentences on the counts charging violations of the Mail Fraud Act, but that portion of the sentence was suspended and the defendant was admitted to probation, the period of probation to begin after the first portion of the sentence was served.

The defendant, a life insurance agent and manager of long experience, organized an Illinois corporation known as the Business and Professional Women's Holding Company in January 1960. The alleged purpose of the holding company was to buy the charter of an existing life insurance company or to form a new life insurance company which would issue policies exclusively to women at greatly reduced rates. The defendant personally promoted the sale of stock in the holding company in order to generate the necessary funds, travelling by plane between Illinois and Indiana in selling the stock, and using the mails in sending literature and delivering stock certificates.

Between October 1960 and May 1963, nearly one million shares of the holding company's common stock were sold for approximately $260,000. The defendant was in complete control of the funds received from investors. Yet at the end of that period, $3,000 in cash and some office furniture and equipment comprised the company's assets. The balance of the money was dissipated, the defendant benefiting directly in an amount exceeding $119,000. These benefits took the form of salaries, commissions, finder's fees, payments to the Insurance Management Institute (owned by the defendant), and other payments for his personal use.

The evidence showed that during the course of his sales activities the defendant repeatedly represented to prospective investors either that the holding company had purchased a life insurance company or that it had an option to do so. These representations were false. The holding company at no time possessed sufficient capital to purchase an existing company or to form a new company. The defendant further represented on numerous occasions that actress Ann Sothern or actress Joan Crawford would be the chairwoman of the board of directors of the insurance company. These representations, and many others, were also materially false.

This brief summary of the evidence shows that the jury could properly find the defendant guilty of a scheme to defraud investors in the sale of securities and the use of the mails and interstate transportation facilities in so doing, the central charges in the indictment. The Government's case was strong and persuasive. The only defense asserted at the trial was that the defendant acted in good faith. The four challenged instructions relate generally to this defense.

The defendant objects to the granting of the standard impeachment instruction on the ground that he was the only witness who was attempted to be impeached. The instruction was given in a form which applied to all witnesses. It correctly stated the law and was applicable to the case, even if the defendant was the only witness impeached. The granting of this instruction was not error.

The defendant contends that it was error to instruct the jury on admissions relating to the crimes charged because there was no evidence that he made any admissions. He defines a criminal admission as "the avowal or acknowledgment of a fact or circumstance from which guilt may be inferred." The evidence, particularly the evidence pertaining to the defendant's conversations with Government agents, contains several such admissions by him. The instruction was proper.

The jury was instructed that the defendant's ignorance of the falsity of his representations to prospective investors could not be excused if he could have ascertained the true facts by the exercise of that degree of care expected of a reasonably prudent person. The defendant says he was charged in the indictment with making willful statements, not reckless statements. But the instruction was given in connection with the defense of good faith and in that regard was a correct and applicable

statement of the law. **Stone v. United States**, 113 F. 2d 70, 75 (6th Cir. 1940); cf. **United States v. Schaefer**, 299 F. 2d 625, 632 (7th Cir.), cert. denied, 370 U. S. 917 (1962).

Finally, the defendant contends that it was error to instruct the jury that "under the law it is immaterial whether the alleged unlawful scheme is either successful or unsuccessful or that the defendant received any benefits as a result of the alleged scheme." He concedes that the instruction contained a correct statement of the law, but argues, relying upon **Coleman v. United States**, 167 F. 2d 837 (5th Cir. 1948), that it was not applicable to the case since the indictment charged him with a successful fraud. A discussion of the **Coleman** case is unnecessary because we think that any possible error in the instruction was harmless. Whatever the charge in the indictment with respect to the success or failure of the defendant's scheme to defraud, the use to which money derived from the scheme was put was material only as it bore upon the issue of the defendant's good faith. **Erwin v. United States**, 242 F. 2d 336 (6th Cir. 1957). The success of a scheme to defraud is not an element of the crime, although it may reflect the defendant's fraudulent intent. Similarly, the failure to benefit from a scheme does not necessarily indicate innocence, although it may mirror the defendant's good faith. The jury was painstakingly instructed on the question of good faith. No instruction tendered by the defendant was refused. Taking the instructions as a whole, as we must, we find no prejudicial error in them. **Beck v. United States**, 305 F. 2d 595, 600 (10th Cir.), **cert. denied**, 371 U. S. 890 (1962).

The judgment of conviction is affirmed.

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Clerk of the United States Court of Appeals for the Seventh Circuit.

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 355

HAROLD A. MEYER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App.) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 18, 1966. A petition for rehearing was denied on May 16, 1966. Mr. Justice Clark extended the time for filing a petition for a writ of certiorari to and including July 15, 1966, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the trial court's instructions to the jury were proper.

STATEMENT

Petitioner was convicted by a jury in the United States District Court for the Southern District of Illinois on eleven counts of violating the Securities Act of 1933 (15 U.S.C. 77q(a)) and four counts of mail fraud (18 U.S.C. 1341). Petitioner was sentenced to concurrent five year terms of imprisonment on each of the Securities Act counts and suspended concurrent five year terms on the mail fraud counts, with probation to begin after service of the first part of the sentence. The court of appeals unanimously affirmed the convictions over petitioner's complaint that four of the instructions to the jury were erroneous (Pet. App.).

The evidence at trial showed that petitioner organized an Illinois corporation in January 1961 known as the Business and Professional Womens Holding Company (D. App. 55–56).[1] The purpose of the holding company was to buy the charter of an existing life insurance company or to form a new life insurance company which would issue policies exclusively to women at greatly reduced rates (D. App. 15–19, 22, 24–25, 55). Petitioner promoted the sale of stock in the holding company to get the necessary funds, using the mails and interstate travel for this purpose (D. App. 12, 14, 18–27, 30–31, 33, 39–41, 76).

Between October 1960 and May 1963, approximately 1,000,000 shares of the holding company's common stock were sold for about $259,000 (D. App. 46). During this period, petitioner was in complete control

[1] The record on appeal consists of the appellant's appendix below (D. App.) and the government appendix below (G. App.).

of the funds received from investors. At the end of the period, the total company assets consisted of $3,000 in cash and office furniture and equipment (D. App. 7). The balance of the funds had been dissipated, with petitioner directly benefiting in the amount of $119,098.79 in the form of salary, commissions, finder's fees, payments to Insurance Management Institute (owned by petitioner) and other disbursements for his personal use (D. App. 36, 46, 71; G. App. 2–3).

During the course of his sales activities, petitioner repeatedly represented to potential investors that the holding company had purchased a life insurance company and in some instances that it had an option to purchase a controlling interest in a life insurance company (D. App. 19, 22, 26, 35). Those representations were false (D. App. 8–10, 29–30). The holding company at no time possessed sufficient capital to purchase an existing company or to form a new company. Despite the fact that investment funds had been dissipated without purchase or formation of an insurance company, petitioner continued to advise potential investors that the insurance company was to begin business within a short time, that only a small amount of stock remained available and that only a small amount of additional capital would be needed (D. App. 18–27).

ARGUMENT

The instruction petitioner asserts was erroneous was as follows (D. App. 98):

> Under the Securities Act of 1933 and the Mail Fraud Statute, which laws of the United

> States the Defendant is charged in this indictment with violating, none of the investors need have been themselves deceived or defrauded by the Defendant or even have relied on the misrepresentations allegedly made to them. Under the law it is immaterial whether the alleged unlawful scheme is either successful or unsuccessful or that the Defendant received any benefits as a result of the alleged scheme. It is only necessary for the Government to prove that the Defendant devised a scheme with intent to defraud and made use of the mails in connection therewith as charged in the indictment.

While admitting that this is, in the abstract, a correct statement of the law,[2] petitioner argues that the instruction was erroneous on the facts of this case. He relies on *Coleman* v. *United States,* 167 F. 2d 837 (C.A. 5), where, in reversing on other grounds, the court held erroneous an instruction that use of the proceeds was immaterial. It did so on the theory that the instruction removed from consideration by the jury charges bearing on the defendant's good faith. However, in the circumstances of the present case, all that the instruction did was correctly to eliminate from the jury's deliberation the need affirmatively to find that the fraudulent scheme succeeded or that the defendant benefited from the scheme.

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[2] *E.g.*, *Adjmi* v. *United States*, 346 F. 2d 654, 657–658 (C.A. 5) certiorari denied, 382 U.S. 823; *Atkinson* v. *United States*, 344 F. 2d 97, 98 (C.A. 8), certiorari denied, 382 U.S. 867; *United States* v. *Shavin*, 287 F. 2d 647, 651–652 (C.A. 7); *Erwin* v. *United States*, 242 F. 2d 336 (C.A. 6).

In any event, there is no conflict between *Coleman* and the instant case. As the court of appeals noted, whatever the charge in the indictment concerning the success or failure of the scheme, the disposition of the proceeds of the scheme was material here only as it bore on petitioner's good faith (Pet. App. 13; *Erwin* v. *United States,* 242 F. 2d 336 (C.A. 6)). Consequently, as the court of appeals found, the painstaking instructions on good faith and fraudulent intent in the instant case were sufficient to make any possible error in the instruction harmless (Pet. App. 13).[3] Indeed, on the evidence here, if the jury interpreted the instruction as requiring them to disregard the evidence as to disposition of the proceeds, such inter-

[3] The instructions on fraudulent intent and good faith were indeed accurate, thorough and meticulous in the instant case (D. App. 90–91, 100–102, 104, 108). They included, among other things, the instruction that there must exist a joint operation of act and intent (D. App. 90); that good faith condones a misstatement and excuses the defendant (D. App. 100); that the defendant must have acted with the specific intent to defraud (D. App. 100); that the act must be done knowingly and not because of a mistake or inadvertance (D. App. 101); that the act must be done with evil motive or bad purpose (D. App. 101); that mere "dealing talk" not accompanied by an artifice to deceive does not constitute fraud (D. App. 102); that the defendant will be given the benefit of doubt where a transaction is capable of either an honest or dishonest construction (D. App. 101, 102); and that the evidence must be such as to satisfy the jury's minds of such fraud or fraudulent intent to the exclusion of any other reasonable theory (D. App. 104). The jury was properly instructed concerning reasonable doubt (D. App. 102). No instruction tendered by petitioner was refused. Considering the instructions as a whole, petitioner's suggestion that they withdrew from the jury the issue of specific intent to defraud (Pet. 8) borders on the frivolous.

pretation would have operated only to petitioner's benefit since there was clear evidence that petitioner had appropriated the proceeds for his personal use.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1966.

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